

Message

From: Prentice, Amanda [Prentice.Amanda@epa.gov]
Sent: 12/8/2020 1:53:21 PM
To: Schaaf, Eric [Schaaf.Eric@epa.gov]
Subject: RE: Not sure if you saw this Law360 article on rule rollbacks

No problem! I saw that Margaret Barry was credited on the second edition (not sure about the first).

From: Schaaf, Eric <Schaaf.Eric@epa.gov>
Sent: Tuesday, December 8, 2020 8:39 AM
To: Prentice, Amanda <Prentice.Amanda@epa.gov>
Subject: Re: Not sure if you saw this Law360 article on rule rollbacks

Thanks!

Sent from my iPhone

On Dec 8, 2020, at 8:36 AM, Prentice, Amanda <Prentice.Amanda@epa.gov> wrote:

Yes – I should have included that as well:

First installation of the article:

Where Trump's Environmental Rollbacks Stand: Part 1

By Ethan Shenkman, Jonathan Martel and Allie Conn

Law360 (December 3, 2020, 5:34 PM EST) --

<image004.jpg>

Ethan Shenkman

<image005.jpg>

Jonathan Martel

<image006.jpg>

Allie Conn

In 2017, President Donald Trump set out an ambitious environmental deregulatory agenda that continued to accelerate in 2020, even in the face of COVID-19.

Indeed, the U.S. Environmental Protection Agency was already in the process of a wide range of deregulatory actions when Trump declared the pandemic a national emergency in March of this year. In May, Trump issued an executive order further encouraging federal agencies to provide regulatory relief in support of economic recovery.[1]

How will the election of Joe Biden as president on Nov. 3 affect this environmental deregulatory agenda? The Biden administration will enter office with a long list of measures

that they will seek to suspend, reconsider, revoke and, in some cases, replace with new and more stringent proposals.

In some situations, the new administration may decide not to act immediately, but to wait instead for ongoing judicial review procedures to play out. In other situations, it may decide to retain certain aspects of regulations enacted by the previous administration. But it is not premature to say that there will be a massive pendulum swing.

Although such a swing can be anticipated, the election's impacts in specific regulatory areas where the Trump administration has sought to leave its mark depends on the status of the regulations in question. This two-part article considers rules and important guidance that fall within three categories: proposed rules that have yet to be finalized; actions that the Trump administration has yet to propose; and final rules that have been or may be challenged in court

First, we highlight 19 important environmental regulations that have been proposed but not yet finalized. With less than two months left until inauguration day, the race is on to see whether the agencies and the U.S. Office of Management and Budget can complete their work and publish final versions of these rules in the Federal Register before the new administration takes over and hits the pause button.

The stakes are high, as a new administration can simply allow proposed rules, which are not yet finalized, to wither and die on the vine. Indeed, a new regulation does not have the force of law until it is published in the Federal Register. And at any point before a regulation is published in the Federal Register, the agency in most cases can rescind the rule.[2]

As with previous administrations, we can expect the Biden administration on day one to issue an executive order imposing a moratorium on so-called midnight regulations, calling for withdrawal or suspension of any rules not yet published in the Federal Register and temporarily prohibiting agencies from issuing any major new rules.[3]

By contrast, once published in the Federal Register, a final rule cannot be modified or rescinded without going through a new rulemaking process with public notice and comment. This is so even if the rule's effective date stretches into the new administration. A new administration has only limited ability to delay a rule's effective date without undergoing a new rulemaking. Furthermore, a published rule that has the force and effect of law cannot be modified or revoked by executive order.

The timing of a rule's finalization depends, in part, on where it is in the OMB review process. Pursuant to Executive Order No. 12866, OMB review can take up to 90 days — which can be extended — to allow for adequate interagency consideration. At some point, the OMB will likely order "pens down" and stop processing new rule packages.

The ability to finalize these rules in the limited time remaining will be challenged by resource constraints at the agencies and the OMB, the worsening effects of the pandemic, a workforce that will have to focus on the transition to a new administration, and competition from other rules waiting in the queue from all corners of the government.

In addition, many of Trump's proposals have received thousands of comments on particularly controversial issues, and agencies are required to consider and respond to those that are "significant." Doing so adequately before issuance of a final rule is time- and resource-intensive.

The current strain on resources could cause further delays in finalization, or a rush job that

could be more susceptible to challenges in court. Although judicial challenges can themselves take time, vulnerable rules are subject to a stay — stopping implementation of the rule pending resolution of the litigation — and that may be more likely where the issuing agency abandons defense of the rule.

Second, we highlight seven environmental regulatory initiatives that the Trump administration has promised but not yet proposed. Time is quickly running out for the regulatory measures in this last category.

It would be difficult, if not impossible, to propose and finalize any new rules in the last two months of the administration. For some issues, the administration may see benefit to getting its proposal down on paper. Other issues will be left for the next administration to address.

List of Key Proposed Rulemakings at Risk During the Lame Duck Period

Many of the Trump administration's key regulatory efforts are currently in rulemaking limbo: The agency has proposed a rule, but has not completed review of public comments and/or interagency review. Finalizing all of these regulatory actions will be difficult to achieve during the lame duck period, but the administration may still try.

These are some of the key proposals on Trump's agenda that are not yet final, in reverse chronological order, beginning with those whose comment periods will close last.

- ***FIFRA — Human Health and Ecological Risk Assessments for Chlorpyrifos:*** Draft risk assessments released for public review on Sept. 22; there will be a 60-day comment period after the EPA issues its proposed interim decision.[4]
- ***Clean Air Act — National Emission Standards for Hazardous Air Pollutants — Polyvinyl Chloride and Copolymers Production:*** Comment period closes on Jan. 8, 2021, but the EPA recommended submission to the OMB by Dec. 9 of comments on information collection provisions; proposal would revise emission limits set in a 2012 emission standard, to make them less stringent.[5]
- ***Clean Air Act — Cross-State Air Pollution Rule Update Remand for the 2008 Ozone NAAQS:*** Comment period closes on Dec. 14; proposed rule addresses remand by the U.S. Court of Appeals for the D.C. Circuit of the 2016 Cross-State Air Pollution Rule update.[6]
- ***Clean Water Act — Reissuance and Modification of Clean Water Act Section 404 Nationwide Permits:*** Comment period closed Nov. 16; the proposal reissues and modifies the Nationwide Permits for utility infrastructure, including NWP 12, among others; a district court had vacated NWP 12 as applied to the construction of the Keystone XL Pipeline, due to the U.S. Army Corps of Engineers' failure to consult under Section 7 of the Endangered Species Act when promulgating the NWPs in 2017; the Corps is not consulting under Section 7 of the ESA on the proposed NWPs.[7]
- ***Clean Air Act — Aircraft Greenhouse Gas Emission Standards:*** Comment period closed Oct. 19; proposes to use fuel efficiency-based metric established by the

International Civil Aviation Organization to control carbon dioxide and nitrous oxide emissions from airplane engines.[8]

- **Endangered Species Act — Regulations for Critical Habitat Designation:** Comment period closed Oct. 8; proposes process for excluding areas from critical habitat designation; final rule sent to the OMB on Nov. 12.[9]
- **Clean Air Act — National Ambient Air Quality Standards for Ozone:** Comment period closed Oct. 1; proposal would retain the existing standards; the most recent regulatory agenda set a target date of January 2021 for issuance of a final rule.[10]
- **Endangered Species Act — Definition of "Habitat":** Comment period closed Sept. 4; proposes to add definition of "habitat" to the U.S. Fish and Wildlife Service and U.S. National Marine Fisheries Service regulations in response to the U.S. Supreme Court's 2018 Weyerhauser decision.[11]
- **TSCA — Dust-Lead Post-Abatement Clearance Levels:** Comment period closed Aug. 24; proposes to lower clearance levels for amount of lead permitted in dust on a surface following completion of an abatement activity, but environmental and public health groups contend limits should be stricter; final rule sent to OMB on Oct. 27.[12]
- **RCRA — Federal Coal Combustion Residuals Permit Program:** In response to public interest groups' request for a 120-day extension of the comment period due to the COVID-19 pandemic, the EPA extended the comment period by 30 days, to May 20;[13] the comment period was then extended a second time until Aug. 7.
- **Clean Air Act — Cost-Benefit Rule:** Comment period closed Aug. 3; the proposal addresses methodology for cost-benefit analysis in air regulations;[14] the EPA sent its final rule to the OMB for prepublication review on Oct. 21.[15]
- **Clean Air Act — National Ambient Air Quality Standards for Particulate Matter:** Comment period closed June 29; final rule sent to the OMB Nov. 4; the proposal retains the current standards, initially set in 2013; a group of U.S. senators sent a letter to EPA Administrator Andrew Wheeler, expressing concerns that the proposal weakens public health protections during the pandemic, linking air pollution to higher death rates due to COVID-19; the EPA previously announced this month as the target date to finalize these standards.[16]
- **Science — Rule Restricting Scientific Studies Relied Upon in Rulemakings:** The EPA extended the comment period by 30 days, to May 18, due to the COVID-19 crisis; the EPA sent the final rule to the OMB for regulatory review on Sept. 14; scientists and physicians have opposed the proposal.[17]
- **Migratory Bird Treaty Act — Rollback of Penalties for Companies That Incidentally Kill Birds:** The Fish and Wildlife Service comment period on the draft environmental impact statement for the proposed rule closed July 20; the FWS

comment period on the proposed rule closed on March 19; the proposal codifies a December 2017 U.S. Department of the Interior Office of the Solicitor legal opinion, which was ruled unlawful and vacated by the U.S. District Court for the Southern District of New York in August;^[18] the final environmental impact statement for the rule was published on Nov. 27 and is subject to a 30-day comment period.^[19]

- ***Safe Drinking Water Act — Lead and Copper Revisions:*** Comment period closed Feb. 12; the EPA sent the final rule to the OMB for regulatory review on July 31; state drinking water regulators, drinking water utilities and former EPA officials have raised concerns over the revisions.^[20]
- ***Toxic Substances Control Act — Regulation of Persistent, Bioaccumulative, and Toxic Substances:*** Comment period closed Oct. 28, 2019; the TSCA requires finalization of the rule by January 2021; comments reveal concerns over whether the EPA should conduct a risk analysis of PBT chemicals before regulating; the EPA has submitted five separate rules — one for each chemical — to the OMB for regulatory review.^[21]
- ***Clean Air Act — Revision of 2015 New Source Performance Standards for Power Plants:*** Comment period closed March 18, 2019; environmental groups have opposed the proposal's revocation of certain pollution control technology requirements; due to delays related to COVID-19, the EPA does not expect to finalize until late this year.^[22]
- ***TSCA — Risk Evaluations of Initial 10 Existing Chemical Substances:*** Beginning in November 2018, the EPA began releasing draft risk evaluations for 10 chemicals, including perchloroethylene, trichloroethylene and asbestos; the 10th draft was released in April; the amended TSCA required these initial 10 evaluations to be completed by June; the EPA's draft risk evaluations faced some criticism from the Science Advisory Committee on Chemicals and commenters; the EPA has issued four final risk evaluations — for methylene chloride (MeC1), i-bromopropane, cyclic aliphatic bromide cluster (HBCD) and carbon tetrachloride — and one revised draft evaluation; cases challenging the MeC1 and HBCD evaluations are pending in the U.S. Court of Appeals for the Ninth Circuit.^[23] Although the current administration has pledged to release all remaining risk evaluations in final form before the end of the calendar year, a new administration might seek to expand or amend the EPA's findings in one or more of these risk evaluations. The risk evaluations are important because the EPA's findings are determinative of what uses of a chemical substance will be regulated if the risk evaluation finds them to present unreasonable risks to human health or the environment.
- ***Clean Air Act — Repeal of Emission Requirements for Glider Vehicles and Engines:*** Comment period closed Jan. 5, 2018; initially proposed in 2017, interested industry groups urged the EPA to revive the proposal to scrap Obama-era limits.^[24]

List of Key Regulatory Initiatives Not Yet Proposed

As time, attention and resources are diverted to the Biden administration's transition, and the second wave of the COVID-19 pandemic grows in intensity, there will be less room for new regulatory proposals before January 2021. The clock will likely run out for any new

proposals to be finalized before the inauguration. Nevertheless, there are some promised initiatives that are worth watching to see if they materialize.

- **Clean Air Act — Renewable Fuel Standards for 2021, Biomass-Based Diesel Volumes for 2022:** A proposal setting forth the renewable fuel volume obligations was submitted to the OMB for review on May 13.[25]
- **TSCA — Exceptions to Toxic Substances Control Act Fees Rule:** On March 25, the EPA announced its plan to consider exemptions to the rule's self-identification requirements associated with fee obligations for EPA-initiated risk evaluations.[26]
- **Clean Air Act — Renewable Fuel Standards Reset of Statutory Blending Volumes for 2021 and 2022:** A proposal was under review at the OMB in Oct. 2019, but the EPA formally withdrew its draft two months later; stakeholders are also looking forward to how the EPA will approach renewable fuel volumes for 2023, which is the first year after the statutory table of volumes ends.[27]
- **Clean Air Act — Heavy Duty Truck Nitrogen Oxide Emission Cuts:** The EPA is considering reductions in NO_x emissions as part of its Cleaner Trucks Initiative to tighten standards for air emissions from heavy-duty trucks; interested industry groups called for the EPA to delay developments on this initiative due to COVID-19; in July it was reported that the EPA was likely to wait until after the election to issue a proposed rule.[28]
- **Clean Air Act — Guidance Implementing the Significant New Alternatives Policy:** The EPA must respond to the D.C. Circuit's remand of a 2018 rule that suspended the EPA's identification of hydrofluorocarbons as unacceptable substitutes for ozone-depleting substances.[29]
- **TSCA — New Chemicals Procedural Regulations:** The EPA intends to revise its procedures for reviewing new chemicals, to align them with the 2016 amendments to TSCA and to improve the review process's efficiency; the spring regulatory agenda set a September target date for a proposed rule.[30]
- **TSCA — Reporting and Recordkeeping for Work Plan Chemicals:** The EPA intends to collect potential hazard and exposure pathway information related to chemicals on the TSCA Work Plan for use in prioritization and risk evaluation; the spring regulatory agenda set a November target date for a proposed rule.[31]

The second installment of this article will discuss a final category of actions: rules that are final, but for which litigation is not yet exhausted.

Ethan Shenkman and Jonathan Martel are partners, and Allie Conn is an associate, at Arnold & Porter.

Arnold & Porter partners Brian Israel and Lawrence Culleen, associate Emily Orler and

environmental law writer Margaret Barry contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Executive Order on Regulatory Relief to Support Economic Recovery, The White House (May 19, 2020).

[2] See Jerry Brito and Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 Admin. L. Rev. 163 (2009).

[3] See, e.g., Memorandum from Rahm Emanuel, White House Chief of Staff, to Heads of Executive Departments and Agencies (Jan. 20, 2009).

[4] Pesticide Registration Review; Draft Human Health and/or Ecological Risk Assessments for Chlorpyrifos; Notice of Availability, 85 Fed. Reg. 60,455 (Sept. 25, 2020).

[5] National Emission Standards for Hazardous Air Pollutants: Polyvinyl Chloride and Copolymers Production Reconsideration, 85 Fed. Reg. 71,490 (Nov. 9, 2020).

[6] Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 85 Fed. Reg. 68,964 (Oct. 30, 2020).

[7] Reissuance and Modification of Nationwide Permits, 85 Fed. Reg. 57,298 (Jan. 29, 2020); *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 454 F. Supp. 3d 985 (D. Mont. 2020), amended, 460 F. Supp. 3d 1030 (D. Mont. 2020).

[8] Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures, 85 Fed. Reg. 51,556 (Aug. 20, 2020).

[9] Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 55,398 (Sept. 8, 2020).

[10] Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 49,830 (Aug. 14, 2020); Clean Air Scientific Advisory Committee (CASAC) Draft Report, EPA CASAC (Jan. 21, 2020); Letter from Andrew R. Wheeler, Administrator, EPA, to Louis Anthony Cox, Jr., Chair, Clean Air Scientific Advisory Committee (April 1, 2020).

[11] Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333 (Aug. 5, 2020).

[12] Review of Dust-Lead Post-Abatement Clearance Levels, 85 Fed. Reg. 37,810 (June 24, 2020).

[13] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program, 85 Fed. Reg. 9940 (Feb. 20, 2020).

[14] Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35,612 (June 11, 2020).

[15] Jonathan Martel et al., Implications of EPA Clean Air Act Cost-Benefit Rule: Part 1, Law360 (Nov. 16, 2020); Jonathan Martel et al., Implications of EPA Clean Air Act Cost-Benefit Rule: Part 2, Law360 (Nov. 17, 2020).

[16] Review of the National Ambient Air Quality Standards for Particulate Matter, EPA (April 30, 2020); Letter from Sens. Hassan, Bennet, Booker, Coons, Gillibrand, King, Merkley, Sanders, Warren, Carper, Blumenthal, Casey, Feinstein, Harris, Markey, Reed, Van Hollen and Whitehouse, U.S. Senate, to Andrew Wheeler, Administrator, EPA (April 14, 2020).

[17] Strengthening Transparency in Regulatory Science, 85 Fed. Reg. 15,396 (March 18, 2020); Letter from Andrew R. Wheeler, Administrator, EPA, to Eddie Bernice Johnson, Chairwoman, Committee on Science, Space and Technology, U.S. House of Representatives (April 2, 2020).

[18] Environmental Impact Statements; Notice of Availability, 85 Fed. Reg. 34,625 (June 5, 2020); Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5,915 (Feb. 3, 2020); Nat. Res. Def. Council Inc. v. U.S. Dep't of the Interior
<image007.png>
, No. 18-CV-4596 (VEC), 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020).

[19] Ethan Shenkman, Trump Rollbacks Hit a New Snag: Incidental Take of Migratory Birds, Env'tl. F. (Nov./Dec. 2020).

[20] National Primary Drinking Water Regulations: Proposed Lead and Copper Revisions, 84 Fed. Reg. 61,684 (Nov. 13, 2019).

[21] Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Extension of Comment Period, 84 Fed. Reg. 50,809 (Sept. 26, 2019); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h), 84 Fed. Reg. 36,728 (July 29, 2019).

[22] Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 65,424 (Dec. 20, 2018).

[23] Chemicals Undergoing Risk Evaluation under TSCA, EPA (last updated Oct. 26, 2020).

[24] Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53,442 (Nov. 16, 2017).

[25] The Renewable Fuel Standard Program: Standards for 2021, Biomass-Based Diesel Volumes for 2022, OIRA (May 13, 2020).

[26] Information on Plan to Reduce TSCA Fees Burden and No Action Assurance, EPA (March 25, 2020). For more on the planned changes and their implications, see Lawrence E. Cullen, EPA Grants Near Term TSCA Relief; Commits to Propose Changes to Scope of Fees Rule, Arnold & Porter (April 1, 2020).

[27] Refiners Bummed RFS Reset Rule Withdrawn, Advanced Biofuels USA (Dec. 20, 2019).

[28] Cleaner Trucks Initiative, EPA (March 27, 2020); Control of Air Pollution from New

Motor Vehicles: Heavy-Duty Engine Standards, 85 Fed. Reg. 3,306 (Jan. 21, 2020).

[29] Natural Res. Def. Council v. Wheeler, No. 18-1172 (D.C. Cir. April 7, 2020).

[30] Updates to New Chemicals Procedural Regulations to Reflect the 2016 Amendments to the Toxic Substances Control Act (TSCA), Reginfo.gov.

[31] Reporting and Recordkeeping for Certain Chemicals Under Section 8(a) of the Toxic Substances Control Act (TSCA), Reginfo.gov.

From: Schaaf, Eric <Schaaf.Eric@epa.gov>
Sent: Monday, December 7, 2020 7:22 PM
To: Prentice, Amanda <Prentice.Amanda@epa.gov>
Subject: RE: Not sure if you saw this Law360 article on rule rollbacks

Amanda: Thanks, this is helpful. Do you by any chance also have Part 1?

From: Prentice, Amanda <Prentice.Amanda@epa.gov>
Sent: Monday, December 7, 2020 5:00 PM
To: Villatora, Liliana <Villatora.Liliana@epa.gov>
Cc: Simon, Paul <Simon.Paul@epa.gov>; Schaaf, Eric <Schaaf.Eric@epa.gov>
Subject: Not sure if you saw this Law360 article on rule rollbacks

Hi guys,

FYI, I'm copying an article that appeared in today's Law360:

https://www.law360.com/newyork/articles/1333624/where-trump-s-environmental-rollbacks-stand-part-2?nl_pk=b1b3bc7d-8f71-4396-8c41-d2932b0ddfef&utm_source=newsletter&utm_medium=email&utm_campaign=newyork

Where Trump's Environmental Rollbacks Stand: Part 2

By Brian Israel, Lawrence Culleen and Emily Orler

Law360 (December 4, 2020, 4:56 PM EST) --

<image001.jpg>

Brian Israel

<image002.jpg>

Lawrence Culleen

<image003.jpg>

Emily Orler

The first part of this article on the final weeks of the Trump administration's ambitious environmental deregulatory agenda discussed environmental rules that the administration has proposed but not finalized, as well as rules that the administration has indicated that it

wishes to advance but has not yet proposed. The article also considered the hurdles that rules in these two categories face.

This second part of the article covers another category: We highlight more than 25 environmental rules that have already been finalized, but for which legal challenges have not yet been exhausted. These rules — more than 15 of which were finalized since President Donald Trump declared COVID-19 a national emergency in March — are at various stages of litigation.

With respect to the most recently published final rules, litigation may be anticipated, but has not yet been filed. In other cases, oral argument has been heard and a decision is pending.

In those cases, the current administration is anxiously awaiting whether opinions will issue before a new team takes the helm at the U.S. Department of Justice. Once new leadership is installed, the DOJ will have the chance to ask the courts to hold cases in abeyance, while the new administration considers whether to reconsider the rules under review.

Other cases are awaiting completion of briefing and/or oral argument. In these cases, the current administration is hoping the rules can be defended while the DOJ and its client agencies are still under the direction of Trump appointees. With every DOJ brief filed and oral argument presented, the ability of a new administration to flip positions and change legal arguments becomes more challenging.

In any event, once the Biden administration assumes office, it will have its hands full in sorting through many dozens of final rules in various stages of litigation across the government, deciding which cases they want to hold in abeyance and which cases they prefer to see play out — with or without the administration's support in defense of the rules.

Based on experience with past administrations, reversing course on a vast sea of regulations and agency actions is easier said than done. Numerous Trump administration efforts to repeal and replace Obama-era initiatives ran into trouble in the courts, for example. Judicial setbacks for the Trump administration will serve as lessons learned for a new Biden administration seeking to roll back the rollbacks.

To the extent feasible, the next administration will likely take its time to set priorities, balancing the desire to undo certain deregulatory measures with the imperative to develop new regulatory programs to meet critical policy objectives and campaign commitments. The new administration will also likely pay careful attention to the intricacies of the Administrative Procedure Act, and the record support required for justifying changes in agency positions — including consideration of reliance interests — in order to avoid the same pitfalls that befell its predecessor.

Moreover, the new administration will have to contend with a large number of Trump-appointed judges — including three new U.S. Supreme Court Justices — who tend to be skeptical of executive branch overreach, and reluctant to extend judicial deference to agency interpretations under the Chevron doctrine.

Importantly, the Democrats' failure to win control of the Senate — depending on the outcome of the runoff elections for both Georgia Senate seats in January — has taken an important tool for regulatory change off the table: the Congressional Review Act's lookback provision.

Under the CRA, Congress has the authority to pass a joint resolution disapproving an agency rule issued toward the end of the previous administration. This joint resolution is

powerful, because it makes the rule "of no force and effect" and bans the agency from issuing another rule in "substantially the same form" unless specifically authorized by statute.

The Trump administration and the 115th Congress made unprecedented use of the CRA — repealing 15 rules issued by the Obama administration.[1] Notably, in April 2019, the Office of Management and Budget issued an expansive definition of the types of agency actions covered by the CRA, including interpretive rules and some guidance documents.[2]

If the Democrats gain control of the Senate by winning both Senate seats in Georgia, regulations published in the Federal Register beginning in June of this year, or possibly even earlier, could be subject to the CRA's lookback period. With the Senate in Republican hands, however, the Biden administration will likely not have this legislative shortcut at their disposal.

List of Key Final Rules Currently Being Challenged in Court or Potentially Subject to Judicial Review

Proposed rules are not the only ones at risk. The Trump administration is also in a race against the clock for the judicial review process to play out in challenges to final rules that have already been issued.

Proponents of these rules would prefer that this administration's appointees oversee briefing and oral argument, and that courts issue decisions before the new administration can reconsider the position of the executive branch. In particular, for cases in which the Trump administration has promulgated a rule that advances an interpretation of a statute, a judicial determination that the interpretation is correct would be more difficult for the next administration to overcome.

COVID-19 has already caused delay in some of these cases. Most courthouses have closed their doors, postponed oral arguments and extended briefing schedules. Courts have had to transition to remote forms of oral arguments and hearings.

Once new leadership at the DOJ has had time to settle in, we can expect to see a slew of motions filed requesting courts to hold further proceedings in abeyance while the Biden administration undertakes review and potential reconsideration of the rules at issue. In the past, the courts have been amenable to such requests, putting cases on ice for many months.

These final actions are listed in reverse chronological order, beginning with rules that have been signed but not published in the Federal Register.

- ***Clean Air Act — Fuels Regulatory Streamlining Rule:*** Final rule published Dec. 4; the rule overhauls the fuels regulatory program via a host of revisions which are slated to take effect on Jan. 1, 2021.[3]
- ***Comprehensive Environmental Response, Compensation and Liability Act — Financial Responsibility Requirements for Chemical Manufacturing; Petroleum and Coal Products Manufacturing; and Electric Power Generation, Transmission and Distribution:*** Final rule published on Dec. 2; finalizes proposed decisions not to impose financial responsibility requirements for facilities in these sectors; final rule covers all three sectors.[4]

- **Clean Air Act — New Source Review Applicability Revisions to Project Emissions Accounting:** Final rule published Nov. 24, effective Dec. 24; this is one of a series of controversial measures designed to reform the New Source Review program under the Clean Air Act.[5]
- **Clean Air Act — Repeal of the "Once In, Always In" Rule for Major Sources:** Published Nov. 19; environmentalists and some states have raised concerns that the proposal will result in plants removing important pollution controls.[6]
- **Resource Conservation and Recovery Act — Coal Ash Landfill Rule Governing Disposal of Waste (Part B):** Final rule published Nov. 12; permits coal ash disposal sites to continue operating without composite liners if they can show there is "no reasonable probability" of contaminating the groundwater; environmental groups are likely to challenge.[7]
- **Federal Insecticide, Fungicide and Rodenticide Act — Agricultural Worker Protection Standard:** Final rule published on Oct. 30, effective Dec. 29; changes application exclusion zone requirements in the 2015 rule to "clarify and simplify" them; some commenters contended that the revised standard is not sufficiently protective.[8]
- **Regulatory Guidance — U.S. Environmental Protection Agency's Guidance Documents Rule:** Final rule published Oct. 19 and effective Nov. 18; the rule establishes procedures and requirements to manage issuance of guidance subject to Executive Order No. 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.[9]
- **Clean Water Act — Revisions to Obama-Era Effluent Limitations Guidelines for Power Plants:** Published in the Federal Register on Oct. 13, and set to be effective on Dec. 14; environmentalists argue that the rule unreasonably assumes that facilities will voluntarily adopt stricter requirements in exchange for longer compliance deadlines; challenges to the final rule have been consolidated in the U.S. Court of Appeals for the Fourth Circuit. [10]
- **Clean Air Act — Rescinding New Source Performance Standards for Methane Emissions from the Oil and Gas Sector:** Final policy amendments published Sept. 14 and effective immediately; final technical amendments published Sept. 15 and effective Nov. 16; both rules have been challenged in the U.S. Court of Appeals for the D.C. Circuit, which initially issued an administrative stay of the policy amendments, but subsequently denied emergency motions for stay; briefing begins this month and ends in Feb. 2021.[11]
- **Resource Conservation and Recovery Act — Coal Ash Landfill Rule Governing Disposal of Waste (Part A):** Published in the Federal Register on Aug. 28, and effective on Sept. 28, the rule provides procedures for the postponement of closure of coal ash disposal sites; environmental groups challenged the rule in the D.C. Circuit on Nov. 24.[12]

- **EAB — Overhaul of Environmental Appeals Board Review:** Final rule published Aug. 21 and effective Sept. 21; the proposal faced opposition by environmental groups and some states.[13]
- **Toxic Substances Control Act — Significant New Use Rule for Long-Chain Perfluoroalkyl Carboxylate Substances:** Final rule published July 27; the 2020 National Defense Authorization Act required the EPA to finalize this rule; proposed guidance on the rule's application to articles with surface coatings containing the regulated substances sent to the OMB on Nov. 5.[14]
- **Safe Drinking Water Act — Perchlorate Drinking Water Regulation:** Final action published on July 21; the EPA announced withdrawal of its 2011 determination to regulate perchlorate; a challenge to this action is underway in the D.C. Circuit.[15]
- **National Environmental Policy Act — Comprehensive Overhaul of NEPA Regulations:** Finalized July 16; lawsuits have been filed in the U.S. District Court for the Western District of Virginia, the U.S. District Court for the Northern District of California and the U.S. District Court for the Southern District of New York, all seeking vacatur of the regulations in their entirety.[16]
- **Clean Water Act — Narrowing Timing and Scope of State Review Under CWA Section 401:** Final rule published July 13; states and environmental interest groups have challenged the rule in the U.S. District Court for the Northern District of California.[17]
- **Clean Air Act — Rollback of Obama-Era Mercury and Air Toxics Standards Rule:** Final rule published May 22; the rule's new cost-benefit methodology has faced criticism by environmentalists, who argue that the new method could be used to weaken regulations for other air pollutants; litigation over the rule is underway in the D.C. Circuit.[18]
- **Clean Air Act — Greenhouse Gas and Fuel Economy Standards for Light Duty Vehicles:** Final rule published April 30; the EPA and the National Highway Traffic Safety Administration have received some criticism for finalizing during the COVID-19 crisis; lawsuits have already been filed in the D.C. Circuit, where briefing is scheduled to be completed in June 2021.[19]
- **Clean Water Act — The Navigable Waters Protection Rule:** Final rule published April 21 (but signed in January); challenges have been brought against the rule in district courts across the country; these cases can proceed concurrently; a district court stayed the rule in Colorado, but other courts denied stay motions.[20]
- **Clean Air Act — Rule Creating Subcategory of Power Plants Under Mercury and Air Toxics Standards Rule:** Final rule published April 15; environmental groups have challenged the rule in the D.C. Circuit, arguing that it has no legal basis and weakens MATS limits for the new subcategory of power plants, resulting in increased air pollution; petitioners moved to hold the case in abeyance for 90 days for the EPA to

take action on pending administrative petitions for reconsideration of the rule; on Oct. 30, the D.C. Circuit ordered the motion granted and the case be held in abeyance pending further order by the court.[21]

- **Clean Air Act — Repeal Appliance Maintenance and Leak Repair Hydrofluorocarbons Regulations:** Final rule published March 11; a coalition of 16 states have argued the rule is unlawful and would increase, rather than decrease, emissions; the Natural Resources Defense Council, as well as the states of New York, Connecticut, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Virginia and Washington, the city of New York and Washington, D.C., have challenged the rule in the D.C. Circuit, with briefing scheduled to be completed in March 2021.[22]
- **Clean Air Act — Renewable Fuel Standards Blending Volume Obligations for 2020:** Final rule published Feb. 6; challenges have been brought by various industry groups in the D.C. Circuit and briefing is set for early 2021; the D.C. Circuit heard oral argument in litigation challenging the 2019 renewable volume obligations in September, and a decision is pending in that case, which could affect the 2020 RVO challenge.[23]
- **Clean Air Act — Rollback of Obama-Era Risk Management Plan Rule:** Final rule published Dec. 19, 2019; litigation challenging the rule is underway in the D.C. Circuit, and environmental groups also filed litigation in the D.C. Circuit on Oct. 26, challenging the EPA's denial of their petition to reconsider the rule.[24]
- **Clean Air Act — National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing:** Final rule published Nov. 1, 2019, in response to petition for reconsideration of 2015 rule.[25]
- **Clean Air Act — SAFE Vehicles Rule Part One Rule:** Final rule published Sept. 27, 2019; revokes waiver for California to implement more stringent greenhouse gas and fuel economy standards; litigation underway in the D.C. Circuit with final briefs submitted Oct. 27; litigation in D.C. district court stayed pending resolution of the D.C. Circuit case.[26]
- **Endangered Species Act — Rollbacks Under the ESA:** Three separate rules under the ESA were published Aug. 27, 2019 (the Listing Rule, the Interagency Consultation Rule and the 4(d) Rule); environmental groups and a coalition of states have filed suits over the three rules in the U.S. District Court for the Northern District of California.[27]
- **Clean Air Act — Landfill Methane Delay Rule:** Final rule published Aug. 26, 2019; allows more time for submission of state implementation plans for landfill emission guidelines, and for EPA review of state plans and EPA preparation of federal implementation plan; litigation underway in the D.C. Circuit; briefing scheduled to be completed by Dec. 11.[28]
- **Clean Air Act — The Affordable Clean Energy Rule:** Final rule published July 8, 2019; rescinds and replaces Obama-era Clean Power Plan; litigation underway in the

D.C. Circuit, which heard a remarkable nine hours of oral argument on Oct. 8.[29] The Obama-era Clean Power Plan was challenged in 2016, but the D.C. Circuit did not have the chance to decide the case before the Trump administration took over; whether the D.C. Circuit will ever have the opportunity to issue a decision in this second case remains to be seen.

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[4] Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry, 85 Fed. Reg. 10,128 (Feb. 21, 2020); Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Petroleum and Coal Products Manufacturing Industry, 84 Fed. Reg. 70,467 (Dec. 23, 2019); Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry, 84 Fed. Reg. 36,535 (July 29, 2019).

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[7] Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments, 85 Fed. Reg. 72,506 (Nov. 12, 2020).

[8] Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68,760 (Oct. 30, 2020).

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- [15] Drinking Water: Final Action on Perchlorate, 85 Fed. Reg. 43,990 (July 21, 2020).
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